INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:

Balman v. *United States*, 94 F. (2d) 197	8
Bennett v. *United States*, 227 U. S. 333	9–10
Bennett v. *United States*, 104 F. (2d) 209	7
Berger v. *United States*, 295 U. S. 78	9
Bimbo v. *United States*, 82 F. (2d) 852, certiorari denied, 297 U. S. 721	10
Boehm v. *United States*, 271 Fed. 454	8
Chadwick v. *United States*, 117 F. (2d) 902, certiorari denied, 313 U. S. 585	6
D'Allessandro v. *United States*, 90 F. (2d) 640	6
Drew v. *United States*, 27 F. (2d) 715	8
Dunbar v. *United States*, 156 U. S. 185	10
Hall v. *United States*, 168 U. S. 632	10
Hoffman v. *United States*, 20 F. (2d) 328	6
Hoke v. *United States*, 227 U. S. 308	9
Husten v. *United States*, 95 F. (2d) 168	7–8
Kutler v. *United States*, 79 F. (2d) 440	10
McNamara v. *Henkel*, 226 U. S. 520	8
Montgomery v. *United States*, 162 U. S. 410	10
Murphy v. *United States*, 39 F. (2d) 412	6
Rosenblatt v. *United States*, 271 Fed. 435, certiorari denied, 256 U. S. 695	10
Russell v. *United States*, 119 F. (2d) 686	4, 7
United States v. *Brims*, 272 U. S. 549	9
United States v. *DiCarlo*, 64 F. (2d) 15	8
United States v. *Howard*, 26 Fed. Cas. No. 15,403	10
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	6
United States v. *Solowitz*, 99 F. (2d) 714	6

479353—42

Cases—Continued. Page

Vause v. *United States*, 53 F. (2d) 346, certiorari denied, 284 U. S. 661 6

Wilkerson v. *United States*, 41 F. (2d) 654, certiorari denied, 282 U. S. 894 8

Willsman v. *United States*, 286 Fed. 852 8

Wilson v. *United States*, 162 U. S. 613 8

Statutes:

Section 3 of the National Stolen Property Act (Act of May 22, 1934, c. 333, 48 Stat. 794, as amended; 18 U. S. C. 415) 2, 10

Section 269 of the Judicial Code (28 U. S. C. 391) 10

18 U. S. C. 550 10

18 U. S. C. 551 10

28 U. S. C. 391 6

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 277

ANTHONY JOSEPH PETRILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 103–110) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 8, 1942 (R. 110–111). The petition for a writ of certiorari was filed August 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by the failure to prove his alleged aliases which were read to the jury by the prosecuting attorney in his opening statement.

2. Whether the evidence was sufficient to sustain the conviction.

3. Whether a fatal variance in proof resulted by virtue of the fact that the indictment described in particular stolen articles alleged to have been transported in interstate commerce, whereas the evidence established the transportation of the property only generally.

STATUTE INVOLVED

Section 3 of the National Stolen Property Act (Act of May 22, 1934, c. 333, 48 Stat. 794, as amended; 18 U. S. C. 415) provides, in part:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

STATEMENT

On June 23, 1941, an indictment in one count was filed in the District Court of the United States for the Eastern District of Missouri charging that petitioner, on or about February 8, 1940, unlawfully transported from Dallas County, Texas, to St. Louis County, Missouri, certain articles of jewelry, valued at approximately $18,635, with knowledge that they had been stolen, in violation of Section 3 of the National Stolen Property Act, *supra* (R. 5–9). Petitioner was found guilty (R. 11–12) and sentenced to imprisonment for ten years (R. 13–14). On appeal to the Circuit Court of Appeals for the Eighth Circuit the conviction was affirmed (R. 110–111).

The evidence presented by the Government may be summarized as follows:

At 8:30 o'clock on the morning of February 7, 1940, Irving Thomas Slifkin, a traveling jewelry salesman, departed from Dallas, Texas, by autobile in the direction of Little Rock, Arkansas (R. 17). He had in his possession approximately $13,000 worth of jewelry, wholesale value (R. 21). Fifteen miles north of Dallas his car was forced off the road by another car, from which emerged two men, one of whom brandished a gun. Slifkin was compelled to lie down in the rear of his car and covered with some coats. The men took possession of the brief case containing the jewelry, and drove Slifkin's car about 200 miles to a point

35 miles west of Texarkana, Texas, where they abandoned Slifkin and his car on a lonely dirt road six hours later. (R. 19–22.)

Early in the morning of the following day a car was observed speeding east on Highway 66 south of Kirkwood, Missouri, by Officers McIntyre and Bieber of the Missouri State Highway Patrol. Three men were seen in the car, two in the front seat and one in the rear. The officers started to overtake the car, which then proceeded to increase its speed to 80 or 85 miles per hour. After a four-mile chase the pursued car struck a rough spot in the road and skidded. The front door on the driver's side was thrown open, and the car overturned. The patrolmen arrived at the scene of the accident a few seconds later and saw that there were then only two men in the car, both unconscious, one in front and one in back. They looked around for the third man, and found petitioner in the driveway of a filling station 75 feet from the overturned car. He was in a dazed condition, "cut and bruised about the face." All three were put in an ambulance, and the driver of the ambulance was requested to place a "detainer" on them at the hospital. R. 34–37, 43–46.) Only one of the three reached the hospital, however, petitioner and one of his companions[1] having apparently escaped on the way (R. 41, 47).

[1] This companion was tried earlier and his conviction for the same offense was affirmed in *Russell* v. *United States*, 119 F. (2d) 686 (C. C. A. 8), where substantially the same contentions as are here presented were made.

A brief case containing jewelry was found in the car, together with several revolvers, some ammunition, a metal saw, and a "jimmy bar." The jewelry was taken to patrol headquarters in Kirkwood. (R. 37–40, 45–47.) Several days later Slifkin identified it as the jewelry taken from him in Texas, except that five or six of the stolen pieces, valued at about $2,000, were missing (R. 23, 24, 26). The retail value of the recovered jewelry was estimated by a Kirkwood jeweler, to whom the jewels were brought for appraisal, at approximately $18,000 (R. 62).

The patrol officers' identification of petitioner as the man found in a dazed and bleeding condition near the scene of the accident was amply corroborated (R. 51, 54, 58).

Petitioner did not testify at the trial and presented no evidence in his behalf.

ARGUMENT

1. Petitioner contends (Pet. 5, 6, 10, 12–14) that he was denied a fair trial because the prosecuting attorney, in his opening statement, read the indictment to the jury, including a list of 28 aliases, and then failed to prove the aliases, though he stated at the time that he would prove them (R. 15).[2] While there are dicta criticizing this

[2] In the argument before the circuit court of appeals, the prosecuting attorney stated that he was prepared to establish, by certified records of prior convictions, all 28 of the aliases alleged in the indictment, for the purpose of impeachment, had petitioner testified in his own behalf (R. 110).

practice in *United States* v. *Solowitz*, 99 F. (2d) 714, 715 (C. C. A. 7), and *D'Allessandro* v. *United States*, 90 F. (2d) 640, 641 (C. C. A. 3), upon which petitioner relies, it should be pointed out that the trial court specifically instructed the jury that, since no evidence had been introduced to prove any of the alleged aliases, it should not consider them or allow them to weigh against petitioner in any way (R. 79). Cf. *Chadwick* v. *United States*, 117 F. (2d) 902, 905 (C. C. A. 5), certiorari denied, 313 U. S. 585. Moreover, in view of the overwhelming evidence of petitioner's guilt (See Statement, *supra*), the incident complained of cannot be said to have affected his substantial rights and therefore does not constitute reversible error (28 U. S. C. 391).[3]

[3] Petitioner likewise complains (Pet. 5, 6–7, 14–15, 26–27) of the use of the word "gangsters" by the prosecuting attorney in referring to petitioner and his companions in his oral argument to the jury. However, the record indicates that the statement may have been provoked by the argument of petitioner's counsel (see R. 76), and, in any event, since the record does not contain the arguments of either side, the incident complained of presents nothing for appellate review. *Vause* v. *United States*, 53 F. (2d) 346, 354 (C. C. A. 2), certiorari denied, 284 U. S. 661; *Murphy* v. *United States*, 39 F. (2d) 412, 414 (C. C. A. 8); *Hoffman* v. *United States*, 20 F. (2d) 328, 329 (C. C. A. 8). Moreover, the statement was immediately retracted upon the objection of petitioner's counsel and the jury was instructed by the court to disregard it (R. 76). Furthermore, in view of the testimony of the patrol officers as to finding several revolvers, a liberal supply of ammunition, and various other tools of the gangster in the car involved in the accident (R. 38–39, 45–46), it is doubtful whether the epithet was improper. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–240.

2. Petitioner's contention (Pet. 5, 10, 15–19) that the evidence is insufficient to sustain the conviction is without merit. From the evidence summarized in the Statement (*supra,* pp. 3–5), it is clear that petitioner was an occupant, and probably the driver, of an automobile containing jewelry of the value of $5,000 or more that had been stolen fifteen hours earlier in a nearby state. This evidence, which petitioner did not attempt to explain away, taken together with the implications of his flight from the pursuing officers, justified the inference that he had transported or caused to be transported the jewelry from the place where it was stolen to the place where he was seen in possession of it[4] (cf. *Russell* v. *United States,* 119 F. (2d) 686, 688 (C. C. A. 8); *Bennett* v. *United States,* 104 F. (2d) 209, 210 (App. D. C.); *Husten* v. *United States,* 95 F. (2d) 168, 170

[4] Petitioner's contention (Pet. 5, 11, 23–24) that the court erroneously charged that the evidence showed that the defendant was in possession of the stolen property is not only without merit, but misstates the record. As is seen from the portion of the court's charge complained of (Pet. 23, R. 82), the court qualified its reference to "the fact * * * that the jewelry was shortly thereafter in the possession of the defendant" with the words "if you believe it to be a fact." Furthermore, the reason alleged by petitioner (Pet. 24) for the court's withdrawal of this part of the charge does not accurately reflect the record. The court withdrew this part of its charge (R. 84) at the request of counsel for petitioner (R. 83), but counsel's request was based on the ground that the charge was an erroneous statement of law, not that it misstated the evidence.

(C. C. A. 8); *United States* v. *Di Carlo*, 64 F. (2d) 15, 16–17 (C. C. A. 2); *Drew* v. *United States*, 27 F. (2d) 715, 716 (C. C. A. 2)), and that he was well aware of its stolen character.[5] The elements of interstate transportation and guilty knowledge were therefore established by circumstantial evidence of the most convincing sort which excluded every reasonable hypothesis but that of guilt. Hence the court properly submitted the case to the jury.

3. Petitioner contends (Pet. 5, 7, 10, 19–21) that there was a fatal variance between the allegations of the indictment and the proof in that the indictment alleged the interstate transportation of particularly described articles of stolen jewelry, whereas the evidence established only generally the transportation of the jewelry described in the indictment. We think the contention lacks merit. Slifkin was handed a copy of the indictment and testified that the jewelry described therein was the jewelry which he had in his possession on February 7, 1940, and of which he was robbed (R. 24–25).

[5] *Husten* v. *United States*, 95 F. (2d) 168, 170 (C. C. A. 8); *Balman* v. *United States*, 94 F. (2d) 197, 199 (C. C. A. 8); *Wilkerson* v. *United States*, 41 F. (2d) 654, 657 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Boehm* v. *United States*, 271 Fed. 454, 456–457 (C. C. A. 2); cf. *Wilson* v. *United States*, 162 U. S. 613, 619; *McNamara* v. *Henkel*, 226 U. S. 520, 525. *Willsman* v. *United States*, 286 Fed. 852 (C. C. A. 8), cited by petitioner (Pet. 22), is clearly not in point, for, unlike the present case, there was nothing to indicate that the defendant was the agent or confederate of the one who had possession of the drugs there involved.

He further testified that the jewelry which was found in the car involved in the accident and which was taken to the Kirkwood patrol office was the same as that stolen from him in Texas, except that five or six pieces were missing (R. 23, 24, 26). Thus, the evidence clearly established that petitioner had transported in interstate commerce at least all but five or six of the articles of jewelry named in the indictment.[6] While it would appear, therefore, that there was a slight variance between the allegations of the indictment and the proof, it is clear that the variance in no way prejudiced petitioner, nor does he so contend. "The true inquiry," this Court has said, "is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger* v. *United States,* 295 U. S. 78, 82.[7] Obviously, there was no violation of

[6] Excluding these articles, the value of which was placed at about $2,000 (R. 24), the value of the remaining articles was, of course, well above the $5,000 minimum jurisdictional value.

[7] See also *United States* v. *Brims*, 272 U. S. 549, 551–553; *Hoke* v. *United States*, 227 U. S. 308, 324; *Bennett* v. *United*

either of these requirements in the instant case. Hence, the variance was nonprejudicial and immaterial, and would not warrant reversal under Section 269 of the Judicial Code (28 U. S. C. 391).[8]

States, 227 U. S. 333, 338–339; *Hall* v. *United States*, 168 U. S. 632, 638–639; *Montgomery* v. *United States*, 162 U. S. 410, 411; *Dunbar* v. *United States*, 156 U. S. 185, 191; *Bimbo* v. *United States*, 82 F. (2d) 852, 855 (App. D. C.), certiorari denied, 297 U. S. 721; *Rosenblatt* v. *United States*, 271 Fed. 435, 438 (C. C. A. 2), certiorari denied, 256 U. S. 695.

United States v. *Howard*, 26 Fed. Cas. No. 15,403 (C. C., D. Mass.), and *Kutler* v. *United States*, 79 F. (2d) 440 (C. C. A. 3), cited by petitioner (Pet. 20–21), are not in conflict with the decision below. In the *Howard* case, the alleged variance was held immaterial and a motion for a new trial based thereon was denied. In the *Kutler* case, the variance was material and substantial, and for that reason the judgment of conviction was reversed.

[8] Petitioner also contends (Pet. 5, 11, 25–26) that the sentence of ten years' imprisonment (the maximum permissible under 18 U. S. C. 415, under which petitioner was indicted) is void because it exceeds the maximum sentence permissible under 18 U. S. C. 551, which provides that accessories after the fact shall be imprisoned not exceeding one-half the longest term of imprisonment prescribed for the punishment of the principal. This contention is based on the mistaken belief that the court was referring to accessories after the fact when it charged the jury (R. 82) that "there is no distinction as between the guilt of a principal and the guilt of an accessory; that one may be charged and prosecuted as a principal, and if it turns out that he is only an accessory, he may nevertheless be convicted." It is clear from the court's definition of an "accessory" as "one who wilfully aids, abets, counsels, or commands the commission of the offense" that reference was made to 18 U. S. C. 550, which makes those who aid, abet, counsel, command, etc. the commission of a federal offense principals, and hence subject to the same penalties as principals.

CONCLUSION

The case was correctly decided below, and no question requiring review by this Court is presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,

PHILIP R. MONAHAN,
Attorneys.

AUGUST 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942